No. 14901.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN PIERCE,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITIONER'S REPLY BRIEF.

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I.

The Opinion Denying Registration Is Not Supported by the Record.

The Commission's Brief, on pages 15 and 20, relies on the testimony of Fox to support the Commission's Opinion. The Brief, like the Commission's Opinion, ignores the finding of the Hearing Examiner concerning Fox:

> "Mr. Fox, an elderly druggist changed his testimony on many occasions and in consequence of these vacillations, I attach little credence to his testimony. He appeared to be not only confused but actually to know few of the details concerning this transaction." [R. 249-27.]

A comparison of the Commission's Opinion and Brief with the Recommended Decision of the Hearing Officer will show that the evidence favorable to Petitioner is ignored by the Commission. This was pointed out in Petitioner's Opening Brief (p. 4). The Commission's Brief, like its Opinion, in our view, is based on an eclectic selection of only the parts of the record deemed unfavorable to Pierce and a disregard of the evidence in his favor. We think the reasoned findings of the Hearing Examiner correctly give a balanced picture of what actually happened at the Hearing.

II.

The Commission's Order Does Not Give Proper Weight, as Required by Law, to the Recommended Decision of the Hearing Examiner.

The Commission's Opinion doesn't discuss *any* of the findings of the Hearing Examiner. But the Supreme Court has said:

> "The committee reports also made it clear that the sponsors of the legislation (the Administrative Procedure Act) thought the statute gave significance to the findings of the examiner."
>
> *Universal Camera Co. v. N. L. R. B.*, 340 U. S. 474, 496.

But what "significance" have a set of findings which aren't even discussed when a contrary decision is announced? The answer, in our opinion, is *none.*

III.

The Failure of the Commission to Give Consideration to the Findings of the Hearing Examiner Was Not Induced by Petitioner.

On pages 31 and 32 of the Commission's Brief a criticism was made of Respondent's Brief to the Commission and it was also pointed out that oral argument before the Commission (in Washington, D. C.) wasn't requested until a petition for rehearing was filed. The facts are these.

The trial before the Hearing Examiner lasted about a week. At its conclusion, while the facts were all fresh in mind, I argued the case orally to the Hearing Examiner. This argument was taken down by the reporter and became part of the typewritten transcript of the proceedings. Several weeks later the typewritten transcript was delivered. It contained 678 pages. I read the entire record, prepared a digest, and prepared recommended findings and a brief to the Hearing Examiner. (This Brief, of course, considered all the charges against Pierce including those the Commission in its opinion later agreed were not substantiated.)

The Hearing Examiner's Recommended Decision, 44 pages in length, then came down, recommending that Pierce's registration be permitted to become effective. I considered it well reasoned and fair. I waived exceptions and submitted the case for decision on the basis of his Recommended Decision. The Commission's Staff filed exceptions. But, in my opinion, all this had been considered before. It was, in my opinion, a third rehash.

The facts of the case had been properly analyzed, in my opinion, in my oral argument, in my brief to the Hearing Examiner, and in his 44 page Recommended Decision. I was loath to again review the lengthy record and file a rehash brief.

There is, as the Court knows, a growing legal literature pointing out that administrative proceedings are becoming alarmingly costly, slow, and cumbersome whereas they were originally intended to be expeditious, simple and inexpensive. The Hoover Commission and the Attorney General have made some studies, and constructive recommendations.

Judge Prettyman, Chairman of the President's Conference on Administrative Procedure, writing in the November 1953 issue of the American Bar Association Journal, on the subject "Reducing the Delay in Administrative Hearings" wrote:

> "Repetition ought to be forbidden" and again:
>
> "Either give hearing officers autonomous authority or establish quick easy communication between them and their agencies, or some designated agency members, so that interlocutory rulings can become positive and fixed without delay." (Pp. 968-969.)

But while legislation can do much, much also depends on whether or not the agencies themselves desire to make their own procedures expeditious. Economy can best be achieved where there is a will to economize.

My brief to the Commission argued therefore that it should modernize its procedures, in line with these learned recommendations, if, in routine cases, and this is a routine

case, it adopted the policy of accepting the decision of the Hearing Examiner. I think this is the sound practice and one which the Agencies will eventually come to, voluntarily or otherwise. This case seemed to me to be a proper one in which to recommend putting into practice the recommendations for efficiency made in the studies cited in my brief. I considered the argument reasonable and the authorities eminent.

In deciding whether to request oral argument before the Commission in Washington, D. C., I weighed the advantages against the cost, for my client isn't wealthy. I concluded the cost of a trip across the continent from the Pacific Coast to the Atlantic, to argue a routine case in which the recommended decision was favorable, wasn't justified.

The Commission's Opinion was a bombshell. Besides ruling against my client, it didn't discuss the argument I made orally to the Hearing Examiner (contained in the transcript), it didn't discuss my brief to the Hearing Examiner, it didn't discuss the Hearing Examiner's Recommended Decision, and didn't discuss my brief to the Commission. I therefore asked for oral argument on motion for rehearing and was then told the request came too late.

The Commission's brief makes some point (p. 32) that I obtained an extension of time to file the petition for rehearing. The Commission's Opinion came down while I was on vacation near Lake Tahoe. The granting of this extension to permit me to complete my vacation is no

reason why Pierce should be denied registration. These and other side issues raised in the Commission's Brief appear irrelevant.

On page 31 of the Commission's Brief there is, as I interpret it, an implied admission that the Commission "had the benefit of a digest of the record prepared by its Opinion Writing Office." Such digest, judging by the Commission's Opinion, must have differed substantially from the 44 page "Recommended Decision" prepared by the Hearing Examiner who heard the evidence, and saw the witnesses.

The Commissioners are busy men. It would be unreasonable to expect them to personally read the 678 pages of this record and the many exhibits. It is reasonable for them to delegate. It is best, in my opinion, for them to adopt the Hearing Examiner's recommendations in routine cases. It is better, in my opinion, for them to let counsel see, and criticize, the digest on which the Commissioners propose to base their decision. The best man to prepare that digest is, obviously, the learned Hearing Examiner who saw and heard the witnesses. The Commission's brief asserts that it is "singularly lacking in grace" (p. 31) for me to object to the procedure of basing the Commission's decision on a secret staff digest. Permit me to comment that the SEC action in preparing two differing digests of the record, one of which is served on counsel for respondent and the other (the private one) is used as the basis for decision cannot expect to qualify, in my opinion, as an act of grace. On the contrary, I

can see no legitimate reason why the digest which the Commission intends to rely upon should not be the paper served on counsel attempting to protect his client's interest.

IV.

The Penalty Already Imposed on Respondent Is More Than Adequate.

Pierce admittedly engaged in activities as a broker-dealer for several years, involving hundreds of transactions. In one (and only one) of these transactions the Commission finds he behaved improperly to the injury of a member of the public. That was Mr. Hayward (who did not consider that he had been mistreated). Such showing is wholly inadequate to show that the public interest requires that Pierce be forever barred from earning his livelihood as a broker and dealer. The Hayward transaction occurred nearly four and one-half years ago. Pierce has been denied registration over a year and a half. He has been to substantial financial expense in these proceedings. They have also educated him, as to SEC attitudes. The lesson has been driven home.

The people in the securities business, and those regulating it, are all presumably human. "To err is human." One alleged error, in hundreds of transactions, must be kept in perspective. It is believed that further exclusion of Pierce smacks of persecution and not protection of the public.

Conclusion.

> "The scope of judicial review is ultimately conditioned and determined by the major premise that the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system."
>
> 69 Harv. L. Rev. 274 (1955).

The Commission's Order dated August 16, 1955, should be modified to bring it into accord with the Recommended Decision of the Hearing Examiner who heard, and understood, the evidence. Petitioner's application for registration should be permitted to become effective.

Respectfully submitted,

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